No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

THE STEEL COMPANY, a/k/a CHICAGO STEEL AND PICKLING COMPANY,
Petitioner,

vs.

CITIZENS FOR A BETTER ENVIRONMENT,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Emergency Planning and Community Right-to-Know Act ("EPCRA") allows citizen suits against parties "for failure to . . . complete and submit" certain forms. The district court, agreeing with the Sixth Circuit Court of Appeals, found that once the forms were completed and submitted, citizen enforcement options ended. The Seventh Circuit Court of Appeals reversed, holding that citizen suits are also authorized for historical violations. The Seventh Circuit did not follow the reasoning of the Supreme Court of the United States, which has held that the similar citizen suit provision of the Clean Water Act does not authorize citizens to sue for historical violations.

The question presented for review is:

Whether, in enacting the citizen suit provision of EPCRA, 42 U.S.C. § 11046, Congress intended to authorize citizens to seek penalties for violations that were cured before the citizen suit was filed, thereby granting EPCRA citizen suit plaintiffs greater enforcement authority than that granted to other citizen suit plaintiffs under other federal environmental statutes.

STATEMENT PURSUANT TO RULE 29.6

The Steel Company, a corporation, has no parent companies or non-wholly owned subsidiaries.

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PETITION FOR WRIT OF CERTIORARI

Petitioner The Steel Company respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 90 F.3d 1237, and is reprinted with the court's order in the Appendix hereto at pages A1 to A16. The order and opinion of the United States District Court for the Eastern District of Illinois is reported at 42 Env't Rep. Cas. (BNA) 1186, and is reprinted in the Appendix at pages A17 to A27.

JURISDICTION

The judgment of the Seventh Circuit Court of Appeals was entered on July 23, 1996. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 326 of EPCRA, 42 U.S.C. § 11046, provides in pertinent part:

(a)(1) Except as provided in subsection (e) of this section, any person may commence a civil action on his own behalf against the following:

(A) An owner or operator of a facility for failure to do any of the following:

(i) Submit a followup emergency notice under section 11004(c) of this title.

(ii) Submit a material safety data sheet or a list under section 11021(a) of this title.

(iii) Complete and submit an inventory form under section 11022(a) of this title containing tier I information as described in section 11022(d)(1) of this title unless such requirement does not apply by reason of the second sentence of section 11022(a)(2) of this title.

(iv) Complete and submit a toxic chemical release form under section 11023(a) of this title.

(b)(1) Any action under subsection (a) of this section against an owner or operator of a facility shall be brought in the district court for the district in which the alleged violation occurred.

(c) The district court shall have jurisdiction in actions brought under subsection (a) of this section against an owner or operator of a facility to enforce the requirement concerned and to impose any civil penalty provided for violation of that requirement.

(d)(1) No action may be commenced under subsection (a)(1)(A) of this section prior to 60 days after the plaintiff has given notice of the alleged violation to the Administrator, the State in which the alleged violation occurs, and the alleged violator.

(e) No action may be commenced under subsection (a) of this section against an owner or operator of a facility if the Administrator has commenced and is diligently pursuing an administrative order or civil action to enforce the requirement concerned or to impose a civil penalty under this chapter with respect to the violation of the requirement.

STATEMENT OF THE CASE

The jurisdiction of the district court was invoked under Section 326(a) of EPCRA, 42 U.S.C. § 11046(a), and 28 U.S.C. § 1331 (general federal question jurisdiction).

A. The Structure of EPCRA

In 1986, Congress enacted EPCRA, which included certain reporting requirements for industrial facilities. The main purposes of EPCRA are twofold: 1) to compile information on the presence and release of chemical substances and make that information available to the public; and 2) to use the reported information to help formulate emergency response plans to react to accidental releases of chemicals. App. at A2-A4.

Of the six EPCRA reporting requirements applicable to industry, two are at issue here. Section 312 of EPCRA requires certain facilities to submit inventory forms, which provide information regarding the amount and location of "hazardous chemicals" at a facility, to state and local agencies. 42 U.S.C. §§ 11022(a), 11022(d). The inventory forms for a given calendar year are due the first of March in the following year. 42 U.S.C. § 11022(a).

Section 313 of EPCRA requires certain facilities using any of 651 specified "toxic chemicals" to submit forms which provide information about the amount of those chemicals present at a facility and their release, if any, into the environment. Section 313 forms are submitted to the United States Environmental Protection Agency ("EPA") and a designated state official. 42 U.S.C. §§ 11023(a), 11023(g); 40 C.F.R. § 372.65. EPA has created the "Form R" as its uniform chemical release form. 40 C.F.R § 372.85. Form Rs for a given calendar year are due on July 1 of the following year. 42 U.S.C. § 11023(a).

Violators of Sections 312 and 313 may be liable to the United States for civil penalties up to $25,000 for each day of violation. 42 U.S.C. § 11045(c)(1 & 3). EPA may seek civil penalties either in an administrative action or in federal court. 42 U.S.C. § 11045(c)(4).

EPCRA authorizes private citizens to bring enforcement actions regarding four of the six reporting requirements. In pertinent part, EPCRA provides that "any person may commence a civil action on his own behalf against . . . an owner or operator of a facility for failure to . . . [c]omplete and submit an inventory form under section [312] [or] a toxic chemical release form under section [313]. . . ." 42 U.S.C. § 11046(a)(1)(A)(iii & iv). A citizen plaintiff may not bring a lawsuit without waiting at least sixty days after providing notice of the alleged violation to EPA, the state, and the alleged violator. 42 U.S.C. § 11046(d)(1). A citizen suit is barred if EPA is pursuing the violator administratively or in court. 42 U.S.C. § 11046(e). In presiding over a citizen suit, a district court has jurisdiction "to enforce the requirement concerned and to impose any civil penalty provided for a violation of that requirement." 42 U.S.C. § 11046(c). A court may award costs of litigation, including attorney's and expert witness fees, "to the prevailing or substantially prevailing party whenever the court determines such an award is appropriate." 42 U.S.C. § 11046(f).

B. Proceedings Below

On March 16, 1995, Citizens for a Better Environment ("CBE") sent to the EPA, the Illinois Environmental Protection Agency ("IEPA"), and The Steel Company an EPCRA 60-day notice of intent to sue alleging that The Steel Company had not submitted certain forms as required by Sections 312 and 313 of EPCRA. On May 1, 1995, before the 60-day notice period had expired, The Steel Company submitted Section 312 and 313 forms to the following statutorily-designated authorities: EPA, IEPA, the Illinois Emergency Management Agency, and the Chicago Fire Academy. App. at A19, A25.

Notwithstanding The Steel Company's compliance within the 60-day period, on August 7, 1995, CBE filed suit against The Steel Company alleging reporting violations of EPCRA. CBE alleged only past EPCRA violations, and, significantly, CBE did not seek injunctive relief ordering The Steel Company to comply with EPCRA. App. at A19, A25. The Steel Company filed a motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) arguing that Congress did not authorize citizen suits for past EPCRA violations. Relying on the Sixth Circuit's opinion in *Atlantic States Legal Found., Inc. v. United Musical Instruments, Inc.*, 61 F.3d 473 (6th Cir. 1995), the district court granted The Steel Company's motion:

> This Court concludes that § 326(a) of EPCRA does not provide the right for a citizen to sue for historical violations of the Act. The "complete and submit" language of that section, along with the purpose of the notice provision and Congress' intended role for the citizen-plaintiff, leads the Court to that decision. . . . In addition, it is uncontested that before the Complaint was filed, Steel Company filed the proper forms with the required agencies for the relevant periods in response [to] CBE's notice of intent to sue. If it were not the case it seems likely that CBE would have included such an allegation in their complaint; no such allegation is present. Because the Complaint alleges only a failure to timely file the required reports, a violation of the Act for which there is no jurisdiction for a citizen suit, the Court dismisses the Complaint.

App. at A24-A26 (footnotes omitted).

CBE appealed the judgment of the district court to the Seventh Circuit Court of Appeals. On July 23, 1996, the Seventh Circuit reversed the judgment of the district court. The Seventh Circuit's decision creates a clear conflict on this question with the Sixth Circuit and also conflicts with relevant decisions of this Court, including several regarding congressional authority to grant standing to a citizen plaintiff.

The Seventh Circuit noted that the district court's reliance on the Sixth Circuit's decision "was not misplaced—*United Musical Instruments* is factually indistinguishable from this case." App. at A8. The court also noted that the Sixth Circuit in turn had relied upon *Gwaltney v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987), in which this Court held that citizens could not sue for past violations of the Clean Water Act. App. at A9.

Nevertheless, the Seventh Circuit chose not to follow the Sixth Circuit's reasoning in *United Musical* or this Court's decision in *Gwaltney*. With respect to *United Musical*, the Seventh Circuit squarely disagreed. With respect to *Gwaltney*, the Seventh Circuit chose to focus on a difference in statutory wording to conclude that Congress must have intended EPCRA citizen plaintiffs to sue for historical violations: the Clean Water Act authorizes a citizen to sue a facility "alleged to be in violation" of its permit, while EPCRA authorizes a citizen to sue "for failure to" comply with certain reporting requirements. App. at A11. The court also failed to follow this Court's reasoning that one purpose of the 60-day citizen notice period is to allow an alleged violator an opportunity to come into compliance, thereby rendering a citizen suit unnecessary. App. at A13. The court of appeals chose not to examine Congress's reasons for establishing the notice period, and apparently dismissed this Court's reasoning in *Gwaltney* on the sole ground that

because Congress amended the Clean Air Act in 1990 to permit citizen suits for some past violations, yet left the notice provision intact, Congress must have intended to delete the opportunity to come into compliance within 60 days from all environmental citizen suits. *Id.*

The court also failed to recognize that Congress modelled EPCRA's citizen suit provision after long-standing principles found in all environmental citizen suit provisions, and thus did not intend to have EPCRA's provision operate differently from those of other statutes. The Seventh Circuit's decision granting citizens the right to sue for past EPCRA violations also conflicts with decisions of this Court regarding standing of citizens to bring suit for environmental violations. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982).

REASONS FOR GRANTING THE PETITION

Although Congress did not expressly authorize citizens to sue for past violations of EPCRA, the Seventh Circuit granted citizens that right. In so doing, the court of appeals decided an important federal question in an extremely active area of environmental law. Since EPCRA's enactment, citizen groups have sent hundreds of letters to industry announcing their notice of intent to sue. Such letters are sent and received nationwide, affecting industry throughout the country. This case provides an opportunity to decide whether Congress intended to authorize citizens to sue for past EPCRA violations.

I.

THE COURT OF APPEALS' INTERPRETATION OF 42 U.S.C. § 11046 CONFLICTS WITH THE SIXTH CIRCUIT'S INTERPRETATION AND ALSO FAILS TO FOLLOW APPLICABLE DECISIONS OF THE SUPREME COURT

A. This Court Has Held That Congress Provided a Notice Period in Environmental Citizen Suits to Allow the Alleged Violator an Opportunity to Come into Compliance

In *United Musical*, the Sixth Circuit faced the same issue as did the Seventh Circuit in this case. The Sixth Circuit held that:

> We discern nothing in the legislative history that indicates that Congress intended to allow citizens to sue [for past violations]. Although civil penalties for purely historical violations may be appropriate in some cases, the congressional scheme leaves to the EPA, with its broad perspective on the entire spectrum of enforcement and compliance, discretion to determine those violators whose conduct warrants such penalties.

United Musical, 61 F.3d at 477. The Seventh Circuit expressly rejected the Sixth Circuit's holding. App. at A10.

The Sixth Circuit based much of its conclusion on the Supreme Court's interpretations of environmental citizen suit provisions as set forth in *Gwaltney* and *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989). *United Musical*, 61 F.3d at 475-77. In *Gwaltney*, this Court was faced with deciding whether Congress intended to authorize citizen suits for past violations of the Clean Water Act. The Court's examination of the mandated 60-day waiting period led it to conclude that Congress could not have intended such suits. Justice Marshall, writing for a unanimous Court, explained the purpose of the notice provision:

> If [EPA] or the State commences enforcement action within that 60-day period, the citizen suit is barred, presumably because governmental action has rendered it unnecessary. It follows logically that the purpose of notice to the alleged violator is to give it an opportunity to bring itself into complete compliance with the Act and thus likewise render unnecessary a citizen suit. If we assume, as respondents urge, that citizen suits may target wholly past violations, the requirement of notice to the alleged violator becomes wholly gratuitous.

484 U.S. at 59-60.

The Court also found that the legislative history of the Clean Air Act, which created the first citizen right to sue, and that of the Clean Water Act, supported its interpretation that citizen suits may not target past violations because Congress clearly intended citizen suits to be injunctive in nature. "These sorts of citizen suits—in which a citizen can obtain an injunction but cannot obtain money damages for himself—are a very useful additional tool in enforcing environmental protection laws." *Id.* at 61 (statement of Sen. Bayh). Other members of Congress supported this limitation on citizen enforcement authority. *Id.* at 61-62. This Court also acknowledged Congress's fear that the federal courts not be burdened with unnecessary citizen suits where, as here, the violation had already been corrected, *id.* at 59-61, yet the Seventh Circuit chose to ignore this concern.

The court of appeals dismissed this Court's *Gwaltney* reasoning regarding the notice period solely on the basis that three years after *Gwaltney*, Congress amended the Clean Air Act "to permit citizen enforcement actions for past violations, yet left the notice provision intact." App. at A13. But the Seventh Circuit failed to recognize that Congress addressed its *Gwaltney* concerns carefully and with limitation. Under the amended Clean Air Act, a citizen may sue for past violations only "if there is evidence that the alleged violation has been repeated." 42 U.S.C. § 7604(a)(1). Some-

how the Seventh Circuit discerned in this amendment a wholesale repudiation of *Gwaltney* finding that the notice period no longer functions as an opportunity to cure, and applied that flawed reasoning to EPCRA, a statute Congress did not amend. App. at A13.

In reiterating its *Gwaltney* reasoning two years later in a citizen suit filed under the Resource Conservation and Recovery Act ("RCRA"), this Court again sought guidance from congressional intent behind the first environmental citizen suit provision and found that "the legislative history [of the Clean Air Act] indicates an intent to strike a balance between encouraging citizen enforcement of environmental regulations and avoiding burdening the federal courts with excessive numbers of citizen suits." *Hallstrom*, 493 U.S. at 29. As it had in *Gwaltney*, this Court acknowledged that Congress intended the notice period to stimulate action either by the government or the alleged violator. First, the notice period allows the government to bring an enforcement action "thus obviating the need for citizen suits." *Id.* Second, the notice period gives the alleged violator an opportunity to bring itself into compliance and likewise "render a citizen suit unnecessary." *Id.*, *citing Gwaltney*, 484 U.S. at 60.

As further evidence that Congress knew what it was doing when it established the various citizen suit provisions, this Court noted that "Congress has addressed the dangers of delay in certain circumstances and made exceptions to the required notice periods accordingly." *Id.* at 30 (noting that citizens may sue immediately for certain, more serious, violations of the Clean Air and Clean Water Acts). This Court acknowledged that although "potential damage to the environment . . . could ensue during the 60-day waiting period, this problem arises as a result of the balance struck by Congress in developing the citizen suit provisions." *Hallstrom*, 493 U.S. at 30; *see also Dague v.*

City of Burlington, 935 F.2d 1343, 1351 (2d Cir. 1991), *rev'd in part on other grounds*, 505 U.S. 557 (1992) (Congress carved out an exception to RCRA's notice period allowing citizens to sue immediately for hazardous waste violations because it "determined that with hazardous wastes the dangers of delay and the potential for greater damage to public health or the environment outweigh the justifications of the pre-suit delay periods.")

The court of appeals also failed to acknowledge that, if Congress had intended to authorize citizen suits for past EPCRA reporting violations, "it could easily have done so." *See United Musical*, 61 F.3d at 475. In *Gwaltney*, this Court was persuaded by the same argument:

> Congress could have phrased its requirements in language that looked to the past . . . but it did not choose this readily available option. . . . Congress has demonstrated in yet other statutory provisions that it knows how to avoid this prospective implication by using language that explicitly targets wholly past violations.

Gwaltney at 57 & n.2 (referring to Congress's 1984 RCRA amendment authorizing citizen suits against any "past or present" generator, transporter, owner or operator "who has contributed or who is contributing" to the "past or present" handling, storage, treatment, transportation or disposal of certain wastes.) Another example of Congress's specifically targeting past violations is its 1990 amendment which first authorized citizens to sue for past Clean Air Act violations. As Congress refrained from adding this language to other citizen suit provisions, the Seventh Circuit was wrong to use the Clean Air Act amendment to distinguish this Court's decision in *Gwaltney*.[1]

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[1] Originally, the Clean Air Act provided solely injunctive relief to a citizen plaintiff. In 1990, Congress also amended the Clean Air

(continued...)

Prior to *Gwaltney*, several lower courts had examined the legislative history of citizen suits and reached the same conclusion. *Proffitt v. Commissioners, Township of Bristol*, 754 F.2d 504, 506 (3d Cir. 1985) (the purpose of the Clean Water Act's and RCRA's notice provisions "is to obviate the need for resort to the courts by prompting either" government enforcement or voluntary compliance); *City of Highland Park v. Train*, 519 F.2d 681, 690-91 (7th Cir. 1975) (in establishing the Clean Air Act's notice provision, "Congress intended to provide for citizens' suits in a manner that would be least likely to clog already burdened federal courts."); *California v. Department of Navy*, 431 F. Supp. 1271, 1278 (N.D. Cal. 1977) (the purpose of the Clean Air Act's notice is to encourage voluntary compliance "with a view toward relieving already overburdened federal courts of precipitate litigation"), *aff'd*, 624 F.2d 885 (9th Cir. 1980). "Litigation should be a last resort only after other efforts have failed." *Hallstrom v. Tillamook County*, 844 F.2d 598, 600-01 (9th Cir. 1987), *aff'd*, 493 U.S. 20 (1989).

In its most recent ruling interpreting environmental citizen suits, this Court reinforced its line of reasoning first announced in *Gwaltney* and *Hallstrom* and held that the "imminent and substantial endangerment" section of RCRA's citizen suit provision, 42 U.S.C. § 6972(a)(1)(B), "was designed to provide a remedy that ameliorates present or obviates the risk of future 'imminent' harms. . . ." *Meghrig v. KFC Western, Inc.*, 116 S. Ct. 1251, 1255 (1996). The citizen suit provision at issue here should not be accorded any greater meaning. EPCRA's effect on the environment is far less direct than that of RCRA and other environmental statutes, which regulate actual harm to our nation's air, water and land. In contrast, EPCRA requires the filing of information. The Seventh Circuit's strained reading of EPCRA's citizen suit provision erroneously led it to conclude that Congress must have intended citizens to pursue actions for past information reporting violations, while this Court found no such intent for violations that involve actual harm to the environment. This Court's review is required to clarify its reasoning in *Gwaltney*.

[1] (...continued)
Act to authorize courts to assess penalties, yet another indication that Congress knows how to provide citizens with the options it deems warranted. Pub. L. No. 101-549, 104 Stat. 2399, 2682 (codified at 42 U.S.C. § 7604(a)).

B. The Seventh Circuit Elevated Citizen Plaintiffs to an Enforcement Level Equal to That of EPA, a Result Congress Clearly Did Not Intend

The Seventh Circuit also failed to appreciate the crucial distinction between government and citizen enforcement of EPCRA: Congress simply did not intend to provide citizens with the same enforcement authority it gave to the government. This Court has recognized this significant difference and found that the citizen's role in environmental enforcement "is meant to supplement rather than to supplant governmental action." *Gwaltney*, 484 U.S. at 60. This Court expressed understandable concern regarding the possibility that citizen suits could hamper the government's enforcement discretion:

> If citizens could file suit, months or years later, in order to seek the civil penalties that the Administrator chose to forgo, then the Administrator's discretion to enforce the Act in the public interest would be curtailed considerably. The same might be said of the discretion of state enforcement authorities. Respondents' interpretation of the scope of the citizen suit would change the nature of the citizens' role from interstitial to potentially intrusive. We cannot agree that Congress intended such a result.

Id. at 61. The Sixth Circuit was also rightly concerned that allowing EPCRA citizen suits for past violations could inhibit EPA's enforcement discretion. *United Musical*, 61 F.3d at 476.

If the Seventh Circuit's decision is allowed to stand, a citizens group, at least in the Seventh Circuit, can challenge any EPA settlement under EPCRA as not having been "diligently pursued." *See* 42 U.S.C. 11046(e). For example, if EPA agrees to forgo assessing penalties against an EPCRA violator and instead requires an environmentally beneficial project, a citizens group, under the decision below, can file suit seeking to overturn that settlement.[2] The court's decision also impairs EPA's ability to develop long-standing, cooperative relationships with the regulated community because citizen groups, which are not subject to EPA enforcement policies, can now second-guess every EPA enforcement action under EPCRA. As noted below, citizen groups have an enormous financial incentive to pursue every EPCRA violation, no matter how trivial or remote, an incentive not shared by EPA.

Moreover, in finding that Congress did not intend to authorize citizen suits for past Clean Water Act violations, this Court in *Gwaltney* heavily relied on the language of the Clean Water Act's citizen suit provision which grants district courts jurisdiction "to enforce such an effluent standard . . . *and* to apply any appropriate civil penalties. . . ." (*citing* 33 U.S.C. § 1365(a)(emphasis added)). The Court reasoned:

> [The Clean Water Act's citizen suit provision] does not authorize civil penalties separately from injunctive relief; rather, the two forms of relief are referenced to in the same subsection, even in the same sentence. The citizen suit provision suggests a connection between injunctive relief and civil penalties that is noticeably absent from the provision authorizing agency enforcement. A comparison of [the relevant Clean Water Act sections] thus supports rather than refutes our conclusion that citizens, unlike the Administrator, may seek civil penalties only in a suit to enjoin or otherwise abate *an ongoing violation*.

Gwaltney, 484 U.S. at 58-59 (emphasis added).

EPCRA's citizen suit provision is identical; it does not authorize civil penalties separately from injunctive relief. Once suit is filed, a district court has jurisdiction only:

> to enforce the requirement concerned *and* to impose any civil penalty provided for a violation of that requirement.

42 U.S.C. § 11046(c) (emphasis added). This is perhaps Congress's most telling indication that EPCRA citizen plaintiffs, like all other citizen plaintiffs, may not seek penalties separately from injunctive relief. The legislative history of citizen suit provisions, on which EPCRA's is based, also supports the conclusion that Congress did not intend citizen plaintiffs to bring penalty-only actions against parties that attain compliance before a suit is filed. The Sixth Circuit was likewise influenced by the differences between citizen and EPA enforcement mechanisms:

> This difference between the grants of authority to the EPA and citizen plaintiffs is significant because it in-

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[2] The United States filed an *amicus* brief and also was allotted time to argue in support of CBE's appeal to the Seventh Circuit. The government erroneously concluded that "the hypothetical articulated in *Gwaltney* could not occur under EPCRA." Nothing in EPCRA, however, prohibits a citizen group from now paging through thousands of settlements, however old, and challenging those the group feels are too lenient. The government failed to appreciate the ramifications of its position that now certainly will lead to litigation over past EPCRA violations that settling parties (and EPA) never could have imagined would later be subject to challenge.

> dicates a congressional intent to limit citizen suits to ongoing violations and to give EPA sole authority to seek penalties for historical violations. . . . Although civil penalties for purely historical violations may be appropriate in some cases, the congressional scheme leaves to the EPA, with its broad perspective on the entire spectrum of enforcement and compliance, discretion to determine those violators whose conduct warrants such penalties.

United Musical, 61 F.3d at 475, 477.[3] The court below disregarded this difference.

C. Citizens Plaintiffs Lack Standing to Sue for Past EPCRA Violations

To justify its decision not to apply *Gwaltney*, the Seventh Circuit emphasized that this Court relied on the Clean Water Act's definition of "citizen" to conclude that "the harm sought to be addressed by the citizen suit lies in the present or the future, not in the past." App. at A12-A13, *citing Gwaltney*, 484 U.S. at 59. The court noted that the Clean Water Act defines "citizen" as a "person . . . having an interest *which is* or *may be* adversely affected." App. at A12 (emphasis in original). Because EPCRA does not contain a definition of "citizen," the court appeared to suggest that, unlike with the Clean Water Act, Congress could not have intended EPCRA citizen suits to have only prospective application. App. at A12-A13.

It is not surprising that Congress defined citizen as it did in the Clean Water Act. By authorizing any "citizen" as so defined to bring an action, Congress intended to codify the

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[3] EPA's "broad perspective" is important, because EPA is equipped to fully appreciate whether an otherwise compliant company should be subject to the steep penalties that EPCRA provides. EPA does not seek penalties for every EPCRA violation.

liberalized grant of standing articulated by the Supreme Court in *Morton v. Sierra Club*, 405 U.S. 727 (1972). *See* S. Conf. Rep. No. 1236, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 3776, 3823; *see also* Boyer & Meidinger, *Privatizing Regulatory Enforcement*, 34 Buff. L. Rev. 833, 848 (1985). That EPCRA authorizes "any person" to bring a citizen suit does not change the fact that citizen suits must be prospective in nature because inherent in every congressional grant of standing are the constitutional requirements that a plaintiff suffer a concrete injury-in-fact and that the injury be redressable by a favorable decision. *Valley Forge*, 454 U.S. at 472.[4] This constitutional "core" of standing is a minimum requirement "which not even Congress can eliminate." Scalia, *Doctrine of Standing*, 17 Suffolk U. L. Rev. 881, 885 (1983); *see also Warth v. Seldin*, 422 U.S. 490, 498-501 (1975). Consequently, the requirement that a person have standing, *i.e.*, "an interest which is or may be adversely affected," necessarily underlies every citizen suit provision, including EPCRA's, even though EPCRA explicitly authorizes "any person" to sue. 42 U.S.C. § 11046(a).

If there had been any doubt as to citizen standing requirements, a recent Court pronouncement resolves the question and solidifies the conclusion that citizen suits cannot target past violations. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). In *Lujan*, this Court clarified that no

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[4] Only in the Clean Water Act did Congress use the term "citizen." Like EPCRA, the Clean Air Act, RCRA, the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), and the Toxic Substances Control Act ("TSCA") authorize "any person" to bring a citizen action. 42 U.S.C. § 7604(a); 42 U.S.C. § 6972(a); 42 U.S.C. § 9659(a); 15 U.S.C. § 2619(a). There are other environmental citizen provisions, *see Hallstrom*, 493 U.S. at 23 n. 1, but those mentioned here have spawned the vast majority of citizen actions.

longer may Congress grant standing to sue to "any person" without also requiring a showing of injury-in-fact. Thus, a person who files suit seeking to require a government agency to undertake some action required by law must show something more than an ideological interest in the outcome. *Id.* at 562-571. Although *Lujan* involved a citizen suit against the government, this Court's reasoning applies with equal force to citizen suits against industry because a defendant's identity cannot alter Article III's requirements of injury and redressability:

> As government programs and policies become more complex and far-reaching, we must be sensitive to the articulation of new rights of action that do not have clear analogs in our common-law tradition. . . . Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before. . . . In exercising this power, Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit.

Id. at 580 (citations omitted) (Kennedy, J., concurring). If Congress has simply given standing to "any person," this requirement is not met. A would-be citizen plaintiff must point to a concrete injury, and not merely to a general congressional grant of standing. *Id.* at 580-81.

By its very nature, a past EPCRA violation lacks the immediacy and redressability necessary to confer standing on a citizen plaintiff. Nor does this case present a situation where Congress "has created a concrete private interest in the outcome of a suit against a private party for the government's benefit, by providing a cash bounty for the victorious plaintiff" who brings suit addressing past acts of fraud on the government. *Id.* at 572-73. Moreover and importantly, citizen suit provisions essentially vest prosecutorial authority in persons who, unlike state or federal

authorities, are not accountable to the electorate. *See also* Scalia, 17 Suffolk U. L. Rev. at 897-88 (the essential element that links the "intimately related" doctrines of standing and separation of powers is "the requirement of *distinctive* injury not shared by the entire body politic." (emphasis in original)). In light of such serious questions surrounding citizen suits for past EPCRA violations, the court should not have found implied authorization for such suits.

II.

THE DECISION OF THE COURT OF APPEALS IS ERRONEOUS

A. The Seventh Circuit Ignored the Similarities Between EPCRA and Other Environmental Citizen Suit Provisions

The Seventh Circuit erroneously concluded that EPCRA's citizen suit provision points to past violations. App. at A11-A13. The court of appeals sought to distinguish *Gwaltney*, but its efforts to do so—particularly its side-by-side comparison of the language of EPCRA's and the Clean Water Act's citizen enforcement provisions—are unconvincing. The question presented must be answered by analyzing Congress's reasons for establishing citizen suit provisions and then determining whether Congress intended to treat EPCRA differently.

The Seventh Circuit failed to acknowledge that Congress was not working off a blank slate when it drafted EPCRA's citizen suit provision. Using the citizen suit provision it created in the Clean Air Act amendments of 1970 as a model, Congress has included such provisions in virtually every piece of federal environmental legislation. Consequently, the citizen suit provisions in federal environmental laws resemble each other almost completely. *See Hallstrom*,

493 U.S. at 22-23 & n. 1; Boyer & Meidinger, 34 Buff. L. Rev. at 847-51.

Congress used its customary citizen suit model when it wrote EPCRA. As in the Clean Air Act, Clean Water Act, and RCRA,[5] EPCRA requires a would-be citizen plaintiff to provide "notice of the alleged violation" to EPA, the state in which the alleged violation "occurs," and the alleged violator at least 60 days prior to filing suit. Like other environmental statutes, EPCRA prohibits citizen suits if the government has already brought an action to require compliance with the requirement at issue. EPCRA, like these other laws, provides for federal court jurisdiction without regard to the citizenship of parties or the amount in controversy, authorizes awards of attorneys' and expert witness fees, and allows intervention by the government and interested parties. Thus, EPCRA's citizen provisions are essentially the same as those in other statutes, including the Clean Air Act, the Clean Water Act, and RCRA.

Ignoring these similarities, the Seventh Circuit erred significantly in its interpretation of EPCRA's venue and notice provisions. The court rightly noted that Congress's use of the present tense in the Clean Water Act helped convince this Court that Congress did not intend to allow citizens to sue for past Clean Water Act violations. App. at A12-A13. However, the Seventh Circuit erroneously found support for its holding that EPCRA must be different in its simple assertion that, "The enforcement provisions of EPCRA are not likewise cast in the present tense." App. at A13. First,

[5] Of the 17 environmental citizen suit provisions cited by the Court in *Hallstrom*, 493 U.S. at 23 & n. 1, these three are the most far-reaching and best known federal environmental statutes. The other 14 citizen suit provisions (one has since been repealed) also all contain a notice period provision and a bar to suit if the government is pursuing the matter.

the Seventh Circuit seized on EPCRA's venue provision, which provides that citizen suits "shall be brought in the district court for the district in which the violation *occurred*." App. at A13 (*citing* 42 U.S.C. § 11046(b)(1), emphasis in original). But the Seventh Circuit ignored the fact that Congress used this exact language in the venue provisions of RCRA, CERCLA, and TSCA,[6] and yet courts have uniformly held, relying on *Gwaltney*, that these statutes do not allow citizen suits for past violations. *See, e.g., Coalition for Health Concern v. LWD, Inc.*, 60 F.3d 1188, 1193 (6th Cir. 1995) (CERCLA citizen suit must allege continuing violation); *Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co., Inc.*, 989 F.2d 1305, 1315 (2nd Cir. 1993) (same for RCRA); *Moreco Energy, Inc. v. Penberthy-Houdaille*, 682 F. Supp. 931, 932 (N.D. Ill. 1988) (same for TSCA).[7]

The Seventh Circuit next focussed on the notice provision itself, which requires that the citizen send the notice of intent to sue to EPA, the alleged violator, and the state "in which the alleged violation *occurs*." App. at A13 (*citing* 42 U.S.C. § 11046(d)(1), emphasis in original). Again, the court ignored the fact that Congress has used this exact language in the seven environmental citizen suit provisions which require notice to a state, including those that this Court found cannot support an action for past violations. Astonishingly, the court of appeals even went so far as to find that the word "occurs" is somehow not "cast in the present tense." App. at A13. This is an obviously strained reading of the differences between the Clean Water Act and EPCRA, and an unfair parsing of language to reach a con-

[6] 42 U.S.C. § 6972(a); 42 U.S.C. § 9659(b)(1); 15 U.S.C. § 2619(a).

[7] The Clean Water Act and the Clean Air Act provide for suit in the district "in which such source is located," (33 U.S.C. § 1365(c)(1); 42 U.S.C. § 7604(c)(1)), which is simply another way of phrasing "in which the violation occurred."

clusion unsupported by this Court's previous holdings and the intent of Congress in establishing citizen suits.

In further explaining its reasoning not to apply *Gwaltney*, the court noted that the Clean Water Act allows citizens to sue for violations "of a permit which *is* in effect" and also permits a state's governor to sue if a violation "*is occurring* in another State and *is causing* an adverse effect on the public or welfare in his State." App. at A12 (emphasis in original). The Seventh Circuit's analysis stopped there, however, and it failed to realize that Congress could not have used such language in EPCRA because: 1) EPCRA does not require permits; and 2) since EPCRA requires only the submission of information, an EPCRA violation necessarily could not involve the kinds of migrating contamination regulated under the Clean Water Act as might affect another state. "EPCRA does not restrict the manufacturing, processing, use or disposal of any chemical; it is simply a reporting statute. . . ." *National Oilseed Processors Ass'n v. Browner*, 924 F. Supp. 1193, 1197 (D.C.C. 1996). The Seventh Circuit thus failed to comprehend the differences between EPCRA and the Clean Water Act and that *Gwaltney* prohibits a citizen suit for a cured violation, but not for one that is continuing.

B. Complying with EPCRA Takes Much More Than a "Minimal Effort"

The court below reasoned that Congress must have intended a citizen to sue for past violations because, if the Sixth Circuit were correct, "citizen suits could only proceed when a violator receives notice of intent to sue and still fails to spend the minimal effort required to fill out the forms and send them in." Citizens therefore would have no reason "to incur the costs of learning about EPCRA. . . ." App. at A14.

Contrary to the court's assertion, completion of EPCRA forms is no simple matter. It is also a more laborious matter for those companies, especially small businesses, that cannot assign personnel to deal solely with environmental compliance. Completing the forms, especially the Section 313 Form R, requires the collection and computation of detailed information regarding a company's operations and practices. EPA itself estimates the public reporting burden for Section 313 familiarization, compliance determination, calculation, completion and recordkeeping to be 124.5 hours in the first year, 61 Fed. Reg. 33588, 33617 (June 27, 1996), or over three working weeks for a single employee, not considering that employee's other duties, hardly a simple matter. EPA recognizes that large facilities may require even more than the average time to comply. *Id.* at 33614.

The completion of Section 312 forms also requires collection and recording of detailed information because some chemicals fall into more than one hazard category and also the reporting of chemical mixtures may complicate the process.[8] *See* 40 C.F.R. § 370.40-41 (if a chemical is part of a mixture, a party may report "either the weight of the entire mixture or only the portion that is a particular hazardous chemical. . . .") EPA admits that even its rule explaining how to calculate chemical mixtures under Section 312 "may have confused the regulated community. . . ." *Confusion About EPCRA Rule Acknowledged*, Chemical Regulation Reporter, Aug. 17, 1990, at 802. EPA estimates that there are over 500,000 chemicals or products which are subject to the Section 312 reporting requirements. *Title III List of Lists: Consolidated List of Chemicals Subject to EPCRA*, EPA, June 1994, at 1 n. 1. And EPA attributes many

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[8] EPA has not provided the regulated community with an estimate of the public reporting burden for Section 312 compliance.

EPCRA compliance problems to "gray areas in the law" that make reporting requirements confusing for both EPA and industry. *EPA Eyes Changes to EPCRA Regulations to Clarify "Gray Areas," Increase Compliance*, Toxics Law Reporter, March 9, 1994, at 1132.

Because of EPCRA's complexity, companies that receive an EPCRA notice letter may not be able to easily comply and submit the required forms within the 60-day notice period. To those companies, including the Petitioner, whose burden is great and resolve to cure the violation is strong, Congress offers an opportunity to come into compliance during the 60-day period, thus avoiding a citizen suit and leaving to EPA's "broad perspective" whether enforcement is truly necessary. This makes EPCRA no different from other environmental statutes where, if a violation is cured within 60 days, citizen enforcement is barred.

EPCRA is also no different from other environmental statutes in that Congress did not guarantee citizens recovery of their costs of identifying alleged violators. A citizen group always runs the risk that a party will be able to cure the alleged violation before the group files suit. The Seventh Circuit's decision guarantees EPCRA plaintiffs the possibility of recovering their costs in any EPCRA suit, however trivial, a result that Congress could not have intended.

Moreover, should a company simply "throw" reports together in an attempt to fend off a citizen suit, it opens itself up to a wide range of civil and criminal penalties. EPA considers the submitting of incomplete forms to be serious violations, which can bring penalties as high as $16,500 per day. EPA EPCRA Section 312 Policy at 15-20; EPA EPCRA Section 313 Policy at 11-12. In addition to running the risk of civil penalties for filing incomplete or misleading forms, a company also runs the risk of criminal prosecution. 18

U.S.C. § 1001; Section 313 Policy at 7; *see also United States v. Murphy*, 935 F.2d 899, 900 (7th Cir. 1991) (submitting false information under a federal statute to a state agency also supports prosecution under 18 U.S.C. § 1001; Section 312 forms are submitted only to state and local agencies.)

III.

THE QUESTION PRESENTED IS IMPORTANT

Numerous reporting deadlines exist under other environmental statutes, and, if a party receives a citizen notice regarding a failure to report and then complies within the 60-day notice period, no citizen suit is authorized under the direction of this Court in *Gwaltney*.[9] It does not make sense that Congress, without explicitly mandating such a result, would authorize citizens to sue for past EPCRA reporting violations but not for past violations under other statutes. One absurd result of the Seventh Circuit's decision is that if a facility does not immediately report a release, but does so upon receiving a notice letter, a citizen plaintiff could still sue under EPCRA, but not under CERCLA. *See* 42 U.S.C. §§ 11004(a)(1 & 3), 11046(a)(1)(A)(i) (certain releases require reporting under both EPCRA and CERCLA).

Because paperwork, rather than substantive, violations are the easiest to prove, citizen groups readily file suits alleging this kind of violation. Greve, *The Private Enforcement of Environmental Law*, 65 Tulane L. Rev. 339, 365-66 (1990). Some observers have found that, "Enforcement pro-

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[9] *See, e.g.*, 33 U.S.C. §§ 1321(b)(5), 1342(a)(2) (requirements for reporting oil discharges and violations of permitted effluent limitations under Clean Water Act); 42 U.S.C. § 7414 (Clean Air Act); 42 U.S.C. § 9603 (CERCLA requirements for reporting released substances).

ceedings brought for violations of the voluminous paperwork requirements of the Clean Water Act generate tens of thousands of dollars in attorneys' fees but no discernible environmental benefits." *Id.* at 366. This lack of environmental benefit is even more pronounced under EPCRA because EPCRA does not restrict the use or disposal of any substance; it is simply a reporting statute.

Contrary to Congress's concern that the federal courts not be flooded with unnecessary citizen suits, the Seventh Circuit's opinion flings open the doors of federal courthouses to such actions. Not only can citizen groups file suit if a company, like the Petitioner, achieves compliance within the 60-day notice period, but a citizen group can also search old government records to determine which companies filed late EPCRA reports and then sue.

For example, a small manufacturer, in compliance with numerous environmental, health and safety requirements, is not in compliance with EPCRA because it does not know EPCRA exists. The company then discovers it is subject to EPCRA and submits the required reports. A year or two later, in searching government records, a citizen group finds the company's EPCRA filings and sends a notice alleging that the company has violated EPCRA. If the company does not settle on the terms demanded by the citizen group, it must defend a lawsuit in federal court. Moreover, if suit is filed, the citizen group has no problem proving liability. Like other environmental statutes, EPCRA is a strict liability statute, and, according to the Seventh Circuit, an EPCRA violation even if cured remains sufficient to allow a citizen suit in federal court. The citizens group has an ironclad lawsuit and will seek to recover its costs and fees as the "prevailing party." 42 U.S.C. § 11046(f).

Congress could not have intended to permit citizen groups to exhume past violations and then bring penalty actions

based on those violations. Yet that is what the decision below allows. Such actions do not abate any violation—by definition, the violation has already been corrected. Nothing is gained by such a suit (with the exception of the citizen group possibly recovering hefty attorneys' fees). A party's resources will be consumed defending an unnecessary lawsuit—resources that could be used to create jobs and benefit the community. The federal judiciary should not be burdened by hearing such moot controversies and instead should concentrate on live disputes in need of resolution.

If the decision below is allowed to stand, it will doubtless precipitate a substantial increase in the volume of EPCRA citizen suits. Immediately after the Seventh Circuit announced its decision, counsel for CBE predicted "a continuation of citizen suits as a result of the Seventh Circuit's ruling." *Lawsuits for Past EPCRA Violations Valid, Court Says, Creating Federal Circuits Split*, Toxics Law Rep., July 31, 1996, at 267. Not surprisingly, in only the first month following the Seventh Circuit's decision, CBE sent out at least seven new EPCRA notices of intent to sue to companies in Chicago and northern Illinois alone. If other citizen groups throughout the country follow suit, as they are likely to do, there will be hundreds, and perhaps thousands, of new EPCRA notice letters and potential federal court actions.

Even before the Seventh Circuit's decision, citizen organizations were extremely active in pursuing EPCRA litigation. Ten such groups filed a joint *amicus* brief in support of CBE's appeal to the Seventh Circuit stating that they research "public files to identify companies which have failed to file required EPCRA reports and have brought citizen suits against such companies." The Seventh Circuit's decision makes their pursuit of EPCRA litigation much easier and will certainly spur more activity.

Unlike the plethora of other environmental and health and safety statutes, EPCRA is a lesser known statute, especially among small businesses, perhaps reflecting EPA's priorities. EPA has estimated that of the approximately 30,000 facilities required to file Section 313 reports, over one-third did not do so. General Accounting Office, *EPA's Toxic Release Inventory Is Useful but Can Be Improved*, at 49 (June 1991) GAO/RCED 91-121. Citizen groups therefore have seized upon EPCRA as a fail-safe, guaranteed funding mechanism. One such group, Don't Waste Arizona, has sent over 90 EPCRA notices to companies in Arizona since 1992, filed at least 12 complaints in federal court, settled with several companies before filing suit, and has yet to resolve its disputes with another 40.[10] *Nonprofit Cashing in on Lawsuits*, The Business Journal-Phoenix, June 21, 1996, at 1, 38. Because proving EPCRA violations is no difficult task, the head of Don't Waste Arizona:

> has latched onto another strategy to pay his bills: He sues unsuspecting small businesses and forces them to meet stringent Environmental Protection Agency guidelines that most didn't even know existed. . . . It's a strategy that's given Don't Waste Arizona an annual budget of close to $80,000. . . .

Id. at 38.

Given the prospect of potentially ruinous penalties for what is an easily-proved strict liability offense, in addition to a possible award of a plaintiff's attorney's fees, business entities invariably find themselves compelled to yield to the citizen group's demands. The judicial extension of citizen suit jurisdiction to past violations makes this practice so lucrative because there is nothing a defendant, having already achieved compliance, can do to defeat the plaintiff's action. Citizen groups thus have enormous leverage, and little to lose and much to gain simply by reviewing government records to determine which companies are easy litigation targets.

[10] Don't Waste Arizona is one of the ten citizen groups that joined in an *amicus* brief in support of CBE's appeal to the Seventh Circuit.

A regulation recently proposed by EPA will add seven major industry groups to the list of facilities already subject to Section 313 reporting requirements and EPA estimates that 6,400 additional facilities will now be faced with this additional reporting burden. 61 Fed. Reg. 33588, 33610. If history is a guide, many of these facilities, already highly-regulated, will be caught unaware of the new requirements and provide citizen groups with a vastly increased number of facilities to sue.

Review of the decision below is also important because of the burden it places on the already highly regulated community. If the court below is correct in determining that Congress intended a past EPCRA violation, however small or remote, and since corrected, to be sufficient to subject a company to a citizen suit, then industry should have a definitive answer so it will not expend resources litigating whether such a suit is proper in the first instance. Congress enacted uniform and comprehensive environmental laws to operate nationwide without difference as to a state or region. The split in the circuits now upsets that national balance. This Court's jurisdiction is required to resolve the uncertainty created by the conflict between the circuits and to interpret the decisions of this Court as they apply to EPCRA.

CONCLUSION

Wherefore, for the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 96-1136

CITIZENS FOR A BETTER ENVIRONMENT,
a not for profit corporation,

Plaintiff-Appellant,

v.

THE STEEL COMPANY, a/k/a Chicago Steel
and Pickling Company, a corporation,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 95 C 4534—George M. Marovich, *Judge.*

ARGUED MAY 29, 1996—DECIDED JULY 23, 1996

Before ESCHBACH, ROVNER, and EVANS, *Circuit Judges.*

EVANS, *Circuit Judge.* In this case we examine for the first time the citizen enforcement provisions of the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA). EPCRA was passed into law as Title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA), and is codified at 42 U.S.C. § 11001 *et seq.* While awareness of SARA is quite high, EPCRA remains one of the lesser-known environmental statutes. Only about 20 federal cases have been decided under EPCRA since its enactment, and only one court of appeals has ruled

on the question before us in this case. *See Atlantic States Legal Foundation, Inc. v. United Musical Instruments U.S.A., Inc.*, 61 F.3d 473 (6th Cir. 1995). Many industrial companies subject to the Act remained unaware of its existence long after it went into effect. GAO, Report to Congress, *Toxic Chemicals—EPA's Toxic Release Inventory is Useful but Can Be Improved* (June 1991). Some discussion of the Act's history and goals may therefore be in order to put this case in context.

In 1984, over 2,000 people were killed and countless injured when a Union Carbide facility in Bhopal, India, unexpectedly released the toxin methyl isocyanide into the environment. This tragedy, combined with smaller incidents closer to home, focused increased attention on the presence of toxic chemicals in our communities, and on the lack of reliable, accessible information regarding the location and use of these chemicals. EPCRA was passed primarily as a means of filling this informational void and improving emergency response capabilities.

The information compiled under the statute has also been put to many creative uses and led to some unexpected results. For example, releases of toxic chemicals have been reduced nearly 43 percent since 1988, the baseline year against which annual reports are measured. EPA, *Environmental News* 1 (Mar. 27, 1995). Some observers have found "reason to believe that the public release of information about discharge of toxic chemicals has by itself spurred competition to reduce releases, quite independently of government regulation." Richard H. Pildes and Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. Chi. L. Rev. 1 (1995).

As the name of the statute suggests, EPCRA has two main purposes. The first, the "Right-to-Know" component, aims to compile accurate, reliable information on the presence and release of toxic chemicals and to make that information available at a reasonably localized level. In furtherance of this goal, EPCRA sets up a reporting scheme whereby users of specified toxic chemicals must inventory

the chemicals used in their facilities on an annual basis. Chemical inventory reporting requirements are found at EPCRA § 312 (42 U.S.C. § 11022). Facilities releasing specified chemicals into the environment must report these releases annually as well, and detailed requirements for reporting chemical releases are set out at EPCRA § 313 (42 U.S.C. § 11023). The case before us arose from an attempt to enforce the reporting requirements of §§ 312 and 313, and the text of those sections is set out at length later in our opinion.

EPCRA is concerned not just with gathering information, but with making that information available in a comprehensible form. In furtherance of this goal, the EPA is charged with establishing and maintaining a publicly accessible computer database using information reported under EPCRA and otherwise disseminating reported information to the public. State and local organizations must also make information reported under EPCRA readily available to the public. (For those who are interested, the complete EPA Toxic Release Inventory database is available online through the National Library of Medicine's TOXNET system.) Information gathered under EPCRA may be used by the public to identify environmental concerns and to encourage industrial users of toxic chemicals to reduce the risks associated with their use. Industrial users can use the information to identify opportunities for savings. Government organizations at all levels can use the data to "compare facilities or geographic areas, to identify hotspots, to evaluate existing environmental programs, to more effectively set regulatory priorities, . . . to track pollution control and waste reduction progress . . . [and] identify potential environmental justice concerns." Office of Pollution Prevention & Toxics, EPA, Public Data Release, *1993 Toxic Release Inventory* (March 1995), p. 4.

The second primary purpose of the Act, the "Emergency Planning" component, is to use the reported information to formulate emergency response plans, again at the local level, in order to limit damage resulting from the

accidental release of toxic chemicals. The Act calls for the establishment in each state of a State Emergency Response Commission. These commissions, referred to as SERCs, must appoint and supervise Local Emergency Planning Committees. The LEPCs, as they are called, must consist of representatives from community organizations, regulated industries, state and local government, fire departments, the media, and other groups. Each LEPC is charged with formulating emergency response plans for its community, based in part on information reported under EPCRA.

While the statute mandates the creation of state and local commissions and requires those organizations to take certain actions, the only burdens EPCRA places on industry are the reporting requirements. Because most of the required information must be compiled and reported for other purposes, the cost of compliance with EPCRA's reporting requirements is low. EPCRA § 313, for example, which requires reporting of releases of toxic chemicals, explicitly states that "[n]othing in this section requires the monitoring or measurement of the quantities, concentration, or frequency of any toxic chemical released into the environment beyond that monitoring and measurement required under other provisions of law or regulation." 42 U.S.C. § 11023(g)(2). Likewise, the reporting requirements of EPCRA § 312 only apply to facilities already subject to certain reporting requirements of the Occupational Safety and Health Act. 42 U.S.C. § 11022(a). Because EPCRA requires little additional effort by regulated facilities, the estimated annual fixed unit costs of § 312 compliance total $326.09, and the estimated variable unit costs range from $43.50 to $146.81. U.S. EPA EPCRA Section 312 Penalty Policy (June 13, 1990), at 29.

In drafting EPCRA, Congress provided a full range of enforcement options. The EPA may seek redress of EPCRA violations through civil or administrative remedies, or may seek criminal penalties. In addition, the authority to bring civil actions seeking declaratory and injunctive relief, as well as civil penalties for specified violations of the Act,

is conferred on SERCs, LEPCs, and state and local governments.

Most relevant to this case, EPCRA grants enforcement authority to ordinary citizens, who may sue in the federal district courts after giving 60 days notice to the alleged violator, the EPA, and state authorities. EPCRA's citizen suit provision is found at 42 U.S.C. § 11046, and states:

> **§ 11046. Civil actions**
>
> **(a) Authority to bring civil actions.** (1) Citizen suits. . . . [A]ny person may commence a civil action on his own behalf against the following:
>
> (A) An owner or operator of a facility for failure to do any of the following:
>
> . . . .
>
> (iii) Complete and submit an inventory form under section 11022(a) of this title containing tier I information as described in section 11022(d)(1) of this title unless such requirement does not apply by reason of the second sentence of section 11022(a)(2) of this title.
>
> (iv) Complete and submit a toxic chemical release form under section 11023(a) of this title. 42 U.S.C. § 11046.

Turning to the sections referred to in the citizen suit provision, we see that they include specific information regarding who must file, where those filings must be submitted, and the timetable in which initial and subsequent filings must take place. Title 42, U.S.C. § 11022 (EPCRA § 312) sets forth reporting requirements for facilities which use toxic chemicals. That section states:

> **§ 11022. Emergency and hazardous chemical inventory forms**
>
> **(a) Basic requirement.** (1) The owner or operator of any facility which is required to prepare or have available a material safety data sheet for a hazardous chemical under the Occupational Safety and Health

Act of 1970 and regulations promulgated under that Act shall prepare and submit an emergency and hazardous chemical inventory form (hereafter in this title referred to as an "inventory form") to each of the following:

(A) The appropriate local emergency planning committee.

(B) The State emergency response commission.

(C) The fire department with jurisdiction over the facility.

(2) The inventory form . . . shall be submitted on or before March 1, 1988, and annually thereafter on March 1, and shall contain data with respect to the preceding calendar year. 42 U.S.C. § 11022.

Title 42, U.S.C. § 11023 (EPCRA § 313) requires facilities to report releases of toxic chemicals into the environment:

§ 11023. Toxic chemical release forms

(a) Basic requirement. The owner or operator of a facility subject to the requirements of this section shall complete a toxic chemical release form as published under subsection (g) of this section for each toxic chemical listed under subsection (c) of this section that was manufactured, processed, or otherwise used in quantities exceeding the toxic chemical threshold quantity established by subsection (f) of this section during the preceding calendar year at such facility. Such form shall be submitted to the [EPA] Administrator and to an official or officials of the State designated by the Governor on or before July 1, 1988, and annually thereafter on July 1 and shall contain data reflecting releases during the preceding calendar year. 42 U.S.C. § 11023.

If, after receiving notice of a private citizen's intent to sue, the EPA chooses to pursue a case, the proposed citizen suit is barred. If the EPA takes no action, citizens acting as "private attorney generals" may seek declaratory and injunctive relief and civil penalties. Civil penalties

assessed against a violator in a citizen suit are not paid to the plaintiff; they are paid into the U.S. Treasury. The court may in its discretion award the costs of litigation to the prevailing or substantially prevailing party.

Violations of §§ 312 and 313 are punishable by civil penalties of up to $25,000 per violation. Every day that a facility fails to comply with the requirements of these sections is considered a separate violation. Likewise, failure to report to each person or organization designated under EPCRA constitutes a separate violation. For example, failure to report under § 312 for a single day would constitute multiple violations; failure to report to the LEPC, failure to report to the SERC, and failure to report to the local fire department would each be an individual violation. At first glance, it seems that the penalties for relatively minor violations would mount up at a staggering rate. The EPA's formal penalty policy, however, shows that the Agency really views $25,000 as a maximum penalty, reserved for only particularly egregious violators. The penalty policy, sort of like the federal sentencing guidelines in criminal cases, takes into consideration a number of statutorily mandated factors, including the seriousness of the violation, the size of the violator, the quantity of toxic chemicals used, prior history of violations, the violator's "attitude," ability to pay, and other factors. These factors yield a "penalty policy matrix," which is used to determine an offender's base penalty. The base amount can range from $200 to the full $25,000. The base penalty is assessed for the first day of violation, while subsequent days are fined at a lower rate according to a formula which takes into account the number of days of violation and the base penalty. *See generally* U.S. EPA EPCRA Section 312 Penalty Policy (June 13, 1990); and U.S. EPA EPCRA Section 313 Penalty Policy (Aug. 10, 1992).

In 1995, Citizens for a Better Environment, a not-for-profit environmental organization, uncovered what it believed to be multiple violations of EPCRA §§ 312 and 313. The alleged violator is The Steel Company, a manufacturer and pickler of steel located on the southeast side

of Chicago. CBE gave notice of intent to sue to The Steel Company, the EPA, and appropriate Illinois authorities on March 16, 1995. The notice alleged that The Steel Company used and released toxic chemicals covered by the EPCRA reporting requirements, and didn't, since the enactment of EPCRA, submit an inventory form as required by § 312 or a toxic chemical release form as required by § 313. (During oral argument, we asked if the company in fact had not filed, and we were told, by the company's lawyer, that the claim was true.) Upon receiving notice of CBE's intent to sue, the company filed its overdue forms with the designated agencies. The EPA did not initiate enforcement proceedings within the 60-day notice period, and CBE filed its complaint in this case in federal district court on August 7, 1995.

The Steel Company filed a motion to dismiss for failure to state a basis of jurisdiction and failure to state a claim upon which relief may be granted. In support of its motion, the company argued that any violations of the Act it may have committed were wholly in the past. Its filings were up to date at the time CBE filed its complaint in the district court, and The Steel Company argued that EPCRA did not authorize citizen suits for "historical" violations. CBE argued that EPCRA authorized citizen suits to enforce the requirements of the Act, including the requirement that filings be submitted annually on or before the dates set forth in the statute. The district court agreed with The Steel Company's interpretation of EPCRA's citizen suit provision and dismissed the case. CBE now appeals. Amicus briefs have been filed in support of CBE's interpretation of the statute by the United States and several other interested groups.

The district court's decision in this case relied almost exclusively on the Sixth Circuit's 1995 decision in *Atlantic States Legal Foundation, Inc. v. United Musical Instruments U.S.A., Inc.*, noted in the opening paragraph of our opinion. This reliance was not misplaced—*United Musical Instruments* is factually indistinguishable from this case. It is also the only appellate court decision addressing the

central question of this case: whether citizens may seek penalties against EPCRA violators who file after the statutory deadline, after receiving notice of intent to sue, but before a complaint may be filed in the district court. The Sixth Circuit held in *United Musical Instruments* that EPCRA authorized citizen suits only for failure to "complete and submit" forms, no matter when those forms were completed or submitted. EPCRA's "citizen suit provision speaks only of the completion and filing of the form. The form is completed and filed even if it is not timely filed." *United Musical Instruments*, 61 F.3d at 475. Relying on *United Musical Instruments*, the district court in this case held that because The Steel Company completed and submitted the required forms by the time CBE filed its complaint, the citizen suit was barred.

United Musical Instruments relied in turn on *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987), in which the Supreme Court interpreted the citizen suit provisions of the Clean Water Act, 33 U.S.C. § 1251 *et seq.* In *Gwaltney*, the Supreme Court held that the CWA's citizen suit provisions did not allow citizens to sue for "wholly past" or "historical" violations. In reaching its decision, the Court looked first and foremost to the plain language of the statute. The CWA citizen suit provision interpreted in *Gwaltney* stated that private parties could bring civil actions against any person alleged "to be in violation" of permits required under the statute. The Court found that the "most natural reading of 'to be in violation' is a requirement that citizen-plaintiffs allege a state of either continuous or intermittent violation," *Gwaltney* at 57, and concluded that citizens "may seek civil penalties only in a suit brought to enjoin or otherwise abate an ongoing violation." *Gwaltney* at 59.

The *Gwaltney* Court looked at the language of the rest of the CWA citizen suit provision, and found that "[o]ne of the most striking indicia of the prospective orientation of the citizen suit is the pervasive use of the present tense throughout . . . ." *Gwaltney* at 59. Its decision bolstered by the "undeviating use of the present tense," *Gwaltney*

at 59, the Court turned to the Act's 60-day notice provision for further support. Finding that "the purpose of notice to the alleged violator is to give it an opportunity to bring itself into complete compliance . . . and thus likewise render unnecessary a citizen suit," *Gwaltney* at 60, the Court said that the notice provision would be rendered meaningless if citizens could sue for "wholly past" violations.

The Sixth Circuit in *United Musical Instruments*[1] and the district court in this case took the literal holding of *Gwaltney*—that the citizen suit provision of the Clean Water Act did not permit suits for violations that had been cured prior to the filing of a complaint—and applied it by analogy to the citizen suit provision of EPCRA. We follow a different line of reasoning.

Rather than applying the holding of *Gwaltney* directly, we apply the interpretive methodology of that case. We examine the statute before us in light of criteria the *Gwaltney* Court used to analyze the citizen suit provisions of the Clean Water Act. Tracking the reasoning of the Supreme Court in *Gwaltney*, we see that the first teaching of that case is to read a statute according to its most plain and natural meaning. "It is well settled that 'the starting point for interpreting a statute is the language of the statute itself.' " *Gwaltney* at 56 (quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). This fundamental principal of statutory interpretation led the Supreme Court to focus on the words "to be in violation" in the Clean Water Act. Even these words, however, were found to contain some ambiguity. *Gwaltney* at 57.

[1] Because we disagree with the Sixth Circuit's interpretation of the citizen enforcement provisions of EPCRA in *Atlantic States Legal Foundation, Inc. v. United Musical Instruments U.S.A.*, 61 F.3d 473 (6th Cir. 1995), this opinion has been circulated among all judges of the court in regular service as required by Circuit Rule 40(f). No judge has voted to hear the case *en banc*.

Every district court that looked at the citizen suit provisions of EPCRA prior to *United Musical Instruments* distinguished the case before it from *Gwaltney* and the Clean Water Act. *See, e.g., Atlantic States Legal Foundation, Inc. v. Whiting Roll-Up Door Mfg. Corp.*, 772 F. Supp. 745 (W.D.N.Y. 1991); *Delaware Valley Toxic Coalition v. Kurz-Hastings, Inc.*, 813 F. Supp. 1132 (E.D. Pa. 1993); *Williams v. Leybold Technologies*, 784 F. Supp. 765 (N.D. Cal. 1992). The Sixth Circuit rejected this distinction, calling it a "hypertechnical parsing of the language of the statutes," *United Musical Instruments* at 477, and the district court in this case followed its lead. But the language of EPCRA differs from the language interpreted in *Gwaltney*; EPCRA authorizes citizens to sue "for failure to" comply with the statute while the Clean Water Act authorized citizen suits where a defendant was alleged "to be in violation." The plain language of the EPCRA citizen enforcement provision does not point clearly to the present tense as its counterpart does in the Clean Water Act. In fact, it does the opposite. The language of EPCRA contains no temporal limitation; "failure to do" something can indicate a failure past or present.

Looking beyond verb tenses, EPCRA's citizen enforcement provision authorizes citizens to sue "for failure to complete and submit" forms "under" §§ 312 and 313. 42 U.S.C. § 11046(a)(1)(A). While the *United Musical Instruments* court found that the use of the words "complete and submit" precluded a citizen suit alleging that violations existed even where forms had been completed and submitted, we disagree. Congress must be assumed to have included the words "under" §§ 312 and 313 for a reason. The most natural reading of "under" a section is "in accordance with the requirements of" that section. It is simply a way to incorporate the requirements of the referenced section without listing them all over again. We read the provision as authorizing citizen suits not only for failure to complete and submit forms, but for failure to complete and submit forms in accordance with the requirements set forth in the referenced sections. One of these

requirements is the statutory mandate that forms filed under § 312 "shall be" submitted annually by March 1. Section 313 forms "shall be" submitted by July 1 of each year. These are not guidelines or suggestions; they are essential elements of the provisions citizens have authority to enforce.[2] Any other interpretation "would render gratuitous the compliance dates for initial submissions which Congress placed in EPCRA's reporting provisions." *Atlantic States Legal Foundation, Inc. v. Whiting Roll-Up Door Mfg. Corp.*, 772 F. Supp. 745, 750 (W.D.N.Y. 1991).

After closely reading the citizen suit provision, the *Gwaltney* Court looked further, to the language of the Clean Water Act enforcement provision as a whole. The Court noted that the CWA allowed citizens to sue "for violation of a permit 'which *is* in effect.' " *Gwaltney* at 59 (quoting 33 U.S.C. § 1365 (f)). The Clean Water Act also permitted the governor of a state to sue as a citizen where a violation "*is occurring* in another State and *is causing* an adverse effect on the public health or welfare in his State." *Gwaltney* at 59 (quoting 33 U.S.C. § 1365(h)). A citizen was defined as " 'a person . . . having an interest *which is or may be* adversely affected' by the defendant's violations of the Act." *Gwaltney* at 59 (quoting 33 U.S.C. § 1365 (g)). The Court concluded from the "undeviating use of the present tense" that "the harm sought

[2] EPCRA's legislative history makes it clear that Congress placed great importance on the timing element of the reporting requirements. *See* Senate Committee on Environment and Public Works, *Superfund Improvement Act of 1985*, S. Rep. No. 11, 99th Cong., 1st Sess., 14-15 (Mar. 18, 1985) (noting that the goal of EPCRA is to make "essential" information "available widely and in a timely fashion"); H.R. Rep. No. 253, 99th Cong., 1st Sess., pt. 1, p. 111 (1985); ("Once the material safety data sheets are developed, it is crucial that they be made available to the public in the quickest, most efficient way possible."); *accord* 132 Cong. Rec. 29747 (Oct. 8, 1986) (statement by Rep. Sikorski) ("Disclosure of hazardous waste emissions . . . must be *swift and complete*. The requirements for disclosure . . . must be *strictly and strenuously enforced*." (Emphasis added.)).

to be addressed by the citizen suit lies in the present or the future, not in the past." *Gwaltney* at 59.

The enforcement provisions of EPCRA are not likewise cast in the present tense. EPCRA provides that citizen suits "shall be brought in the district court for the district in which the alleged violation *occurred*," 42 U.S.C. § 11046(b)(1), and that notice of intent to sue must be given to the EPA, the alleged violator, and "the State in which the alleged violation *occurs*." 42 U.S.C. § 11046(d)(1). Nowhere does EPCRA contain the "is occurring" language of the CWA to indicate that citizens must allege an ongoing violation. The presence of such language in the CWA shows that Congress knows how to require allegations of an ongoing violation as a condition of a citizen suit when it sees fit. The absence of language limiting citizen suits to ongoing violations, and Congress' choice of language specifically referring to past violations, are strong indicators that a cause of action exists under EPCRA for violations that are not ongoing at the time a citizen complaint is filed.

The *Gwaltney* decision also cited CWA's 60-day notice provision as a reason for its holding. The Court reasoned that, in the context of the Clean Water Act, the only rationale for the notice provision was to allow violators to bring themselves into compliance. Allowing citizens to sue after violations ceased would defeat the purpose of the notice provision and undercut the EPA's enforcement discretion. The Court stated that it "cannot agree that Congress intended such a result." *Gwaltney* at 61. This line of reasoning is no longer as compelling as it was when *Gwaltney* was decided. Since then, Congress has expressly intended precisely that result. The Clean Air Act, 42 U.S.C. § 7401 *et seq.*, contains a notice provision just like the one in the Clean Water Act. In 1990 Congress amended the Clean Air Act to permit citizen enforcement actions for past violations, yet left the notice provision intact.

Recognizing that citizens may sue under EPCRA even after violators have submitted overdue filings does not render the notice provision gratuitous. Notice gives an

alleged violator a chance to correct the citizen's information if the citizen is mistaken about the existence of a violation. Because each day of an EPCRA violation is a separate violation carrying additional penalties, notice gives a violator the opportunity to limit its exposure by filing late reports. The notice provision preserves the EPA's enforcement discretion, giving the Agency a chance to take enforcement action if it chooses. Notice also conserves resources by giving violators the opportunity and the incentive to enter into settlement negotiations with citizens or the EPA. As we noted in *Supporters to Oppose Pollution, Inc. v. Heritage Group*, 974 F.2d 1320, 1322 (7th Cir. 1992), a key rationale for the notice provision of another environmental statute was to require a "would-be champion to try negotiation before litigation." That rationale applies with no less force to the notice provision in EPCRA.

On a broader scale, we must interpret the specific language of the citizen suit provision in a way that gives meaning to the provision as a whole. The incentives created by the district court's interpretation would render the citizen enforcement provision virtually meaningless. EPCRA creates a structure that encourages private citizens to invest the resources necessary to uncover violations of the Act by allowing courts to award the costs of enforcement to prevailing or substantially prevailing parties. (It should be noted that this same structure discourages frivolous citizen suits; it does not limit awards of costs to plaintiffs.) If citizen suits could be fully prevented by "completing and submitting" forms, however late, citizens would have no real incentive to incur the costs of learning about EPCRA, investigating suspected violators, and analyzing information. Put simply, if citizens can't sue, they can't recover the costs of their efforts.

If the interpretation advanced by the Sixth Circuit and adopted by the district court is correct, citizen suits could only proceed when a violator receives notice of intent to sue and still fails to spend the minimal effort required to fill out the forms and turn them in. This would large-

ly shift the cost of EPCRA compliance from regulated industrial users to private citizens. Private citizens would have to absorb much of the cost of monitoring chemical use and keeping up to date on changes in EPCRA requirements, with little or no hope of recovering those costs through awards of litigation expenses. Private enforcement of the reporting requirements would undoubtedly drop off. This scenario is impossible to reconcile with the clearly expressed intent of Congress, or with the very existence of the citizen enforcement provision.

The decision of the district court is reversed and the case remanded for further proceedings.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: July 23, 1996

BEFORE:
Honorable JESSE E. ESCHBACH, Circuit Judge
Honorable ILANA DIAMOND ROVNER, Circuit Judge
Honorable TERENCE T. EVANS, Circuit Judge

No. 96-1136

CITIZENS FOR A BETTER ENVIRONMENT,
a not for profit corporation,

Plaintiff-Appellant

v.

STEEL COMPANY, a corporation, also known
as CHICAGO STEEL & PICKLING COMPANY,

Defendant-Appellee

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 95 C 4534—George M. Marovich, Judge

The decision of the District Court is REVERSED, with costs, and the case is REMANDED for further proceedings in accordance with the decision of this court entered on this date.

[Dated December 19, 1995]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CITIZENS FOR A BETTER ENVIRONMENT, a not for profit corporation, Plaintiff,	)	
v.	)	No. 95 C 4534
THE STEEL COMPANY, a/k/a **CHICAGO STEEL AND PICKLING COMPANY**, a corporation, Defendant.	)	Judge George M. Marovich

MEMORANDUM OPINION AND ORDER

The plaintiff, Citizens for a Better Environment ("CBE"), brought this suit against the defendant, The Steel Company ("Steel Company"), for alleged violations of the Emergency Planning and Community Right-to-Know Act ("EPCRA"), 42 U.S.C. § 11001, *et seq.* Steel Company now moves to dismiss the action under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). For the reasons set forth below, this Court grants Steel Company's motion.

I. BACKGROUND

Amid growing concern for the preservation of the environment, Congress enacted EPCRA in 1986. The Act

requires industrial firms to inventory and report their use of certain chemicals and of the amounts of toxic emissions to the United States Environmental Protection Agency ("EPA") and designated state officials. 42 U.S.C. §§ 11022, 11023. Because these agencies use these disclosures to identify polluters that need to be stopped from further damaging the environment, the failure to file the reports required by EPCRA may subject non-complying firms to the possibility of prosecution by the EPA, including civil penalties of up to $25,000 for each violation. 42 U.S.C. § 11045(c)(1).

Additionally, if the EPA chooses not to prosecute, § 326(a) of EPCRA provides for citizen enforcement by allowing them to sue offending firms directly in the District Court. 42 U.S.C. § 11046(a). Prevailing parties may recover reasonable costs and attorneys' fees. 42 U.S.C. § 11046(f). A citizen suit may not be commenced, however, until sixty days after the citizen provides notice of the alleged violation to the EPA, designated state officials, and the alleged violator. 42 U.S.C. § 11046(d). If the EPA chooses to address the alleged violation either administratively or in federal court, the citizen may not bring her action. 42 U.S.C. § 11046(e).

CBE is a not-for-profit environmental protection organization based in Illinois. The group has a membership of approximately 30,000 people, a large portion of whom live in the Chicago area. The organization claims to attempt to prevent environmental health threats through research, public education and citizen involvement. Its members use information reported under EPCRA to learn about toxic and other chemicals that are released into their communities.

Steel Company is an Illinois corporation that operates industrial steel manufacturing facilities on Chicago's South Side. As a part of its operations, Steel Company removes rust from steel coils, a process known as "steel pickling."

CBE alleges that by virtue of its use and disposal of certain chemical agents, including Hydrochloric Acid, Sodium Hydroxide, and Ferrous Chloride, Steel Company falls under the parameters of § 312 and § 313 of EPCRA, 42 U.S.C. §§ 11022, 11023 and is therefore required to file annual reports. CBE alleges that in spite of this requirement, Steel Company had not filed any EPCRA reports from 1987 to 1995.

On March 16, 1995, CBE gave notice of Steel Company's alleged violation of the Act and of CBE's intent to sue to the EPA, the Illinois EPA, the Illinois Governor, and Steel Company. Because the EPA had not initiated an enforcement proceeding after the mandatory waiting period, CBE filed suit against Steel Company under § 326(a) of EPCRA. 42 U.S.C. § 11046(a), on August 7, 1995.

Steel Company brings this motion to dismiss, claiming that it has complied with EPCRA's reporting requirements. Specifically, Steel Company alleges that, after receiving CBE's intent to sue in March 1995, it filed the required reports with the appropriate agencies, bringing itself up to date through 1995. With the filing of the reports prior to CBE's initiation of the suit, Steel Company claims that it has cured its previous non-compliance with the Act, thereby denying this Court jurisdiction to entertain a suit by CBE, a citizen, for any present reporting violation. The only remaining allegations, that of late

filings, is considered a "historical" violation, which is not authorized as a citizen suit under the Act.

II. DISCUSSION

Steel Company seeks to dismiss CBE's complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) on the ground that it fails to state a basis for jurisdiction, as well as under Rule 12(b)(6) on the ground that it fails to state a basis upon which relief may be granted.

CBE's complaint consists of two counts of allegations of EPCRA reporting violations on the part of Steel Company. Count I alleges that Steel Company failed to comply with § 312(a) of EPCRA, 42 U.S.C. § 11022(a), by failing to file reports detailing the firm's use of certain "hazardous" and "extremely hazardous" chemicals by March 1st of each year since 1988. Count II alleges Steel Company's failure to comply with § 313 of EPCRA, 42 U.S.C. § 11023, by virtue of its not having filed reports detailing the firm's release of certain "toxic" chemicals into the environment by July 1st of each year since 1988.

A. Past Reporting Violations

CBE claims that, by failing to complete and submit § 312(a) forms and § 313 forms by the statutory deadlines, Steel Company failed to comply with the annual reporting requirements, and has, thus, defeated the purposes of EPCRA. Pointing out that each day a firm fails to file an EPCRA report constitutes a separate violation of the Act, CBE alleges that Steel Company has amassed over 19,000 violations of § 312(a) and over 2,500 violations of § 313 since 1988.

In deciding a motion to dismiss, the Court must accept as true all facts alleged in the complaint. *Madden v. Country Life Ins. Co.*, 835 F. Supp. 1081, 1084 (N.D. Ill. 1993). Accordingly, the Court must assume as true the fact that Steel Company never filed an EPCRA report on time for seven years, and that it did, indeed, register over 20,000 violations of the Act. *Id.* That assumption, alone, however, does not end this Court's inquiry. For even though § 326(a) of the Act provides the right for citizens to enforce the reporting requirements of EPCRA, Steel Company claims that right to sue does not extend to suits for "historical" violations of the reporting requirements of §§ 312 and 313.

According to Steel Company, § 326(a) of EPCRA limits citizens' actions to those situations where a citizen seeks to force a plaintiff to come into compliance with the Act's reporting requirements. In other words, Steel Company claims that CBE cannot sue it for its failure to file timely EPCRA reports in the past, but only may sue to force Steel Company actually to complete and submit any EPCRA reports from 1988 to 1995 that it may have failed to file.

CBE disagrees with Steel Company's interpretation of § 326(a), claiming that Congress did not intend for the citizen suit provision to be read so narrowly. CBE bolsters its position by citing to several District Court cases that allowed a citizen-plaintiff to sue under EPCRA for wholly past reporting violations. *See Atlantic States Legal Foundation, Inc. v. Whiting Roll-Up Door Mfg. Corp.*, 772 F. Supp. 745, 751-53 (W.D.N.Y. 1991); *Williams v. Leybold Technologies, Inc.*, 784 F. Supp. 765, 768 (N.D. Cal. 1992); *Delaware Valley Toxics Coalition v. Kurz-Hastings*, 813 F. Supp. 1132, 1141 (E.D. Pa. 1993).

CBE claims that these cases show that it may, indeed, sue Steel Company for its past failures to file EPCRA reports in a timely manner.

A recent Court of Appeals case, however, seems to have cast doubt on the authority relied upon by CBE. In *Atlantic States Legal Foundation, Inc. v. United Musical Instruments U.S.A., Inc.*, 61 F.3d 473 (6th Cir. 1995), the Sixth Circuit Court of Appeals was faced with a suit by an environmental organization against an industrial manufacturer who was alleged to have violated EPCRA's reporting regime. Specifically, the *Musical Instruments* defendant failed to file its § 313 Form R's for the years 1988 to 1990 on time, though the defendant filed those reports after receiving the plaintiff's notice of intent to sue. *Id.* at 474. As a result, the plaintiff was left to sue the manufacturer only for late filing rather than not filing at all. *Id.*

To determine whether the statute allows suits by citizens for late filings, or as the court termed them, "historical" violations of EPCRA, the court began by examining the plain language of the statute and noted that § 326(a) allows citizens to sue only for "failure to . . . [c]omplete and submit [Form R's] under § 313 of this title." 42 U.S.C. § 11046(a)(1)(A)(iv). The court noted that, while § 313 requires the submission of the Form R's by a certain date, the citizen suit provision of § 326(a) emphasizes only the completing and submitting of the forms, making no reference to the time deadline for filings. *Id.* at 475. From this difference, the court concluded that Congress intended to distinguish between failing to file on time and not filing at all. Specifically, the court recognized that a company that files EPCRA forms after the required dates, while in violation of §§ 312 and 313, have

nonetheless "complete[d] and submit[ted]" the required forms. *Id.*

The court also contrasted the § 326 civil suit provision to the provision which authorizes the EPA to bring civil suits. As the court pointed out, the EPA is empowered to bring actions against any person "who violates any requirement" of § 313, 42 U.S.C. § 11045(c)(1), to assess and collect "any civil penalties for which a person is liable." 42 U.S.C. § 11045(c)(4). This language stands in stark contrast to the "complete and submit" language of the citizen suit provision. *Id.* The court deemed significant that difference in language because it revealed Congressional intent to limit citizens' EPCRA role to correcting ongoing violations, while the EPA has the sole authority to seek penalties for historical violations. *Id.*

The *Musical Instruments* court found support for its decision in a Supreme Court case interpreting the Clean Water Act, 33 U.S.C. §§ 1251-1387. In *Gwaltney of Smithfield v. Chesapeake Bay Found, Inc.*, 484 U.S. 49 (1987), the Supreme Court held that the Clean Water Act's citizen suit provision did not allow suits for historical violations of that Act. The Court's rationale for that decision was two-fold. First, the Court found that the Act's sixty-day notice provision would be rendered meaningless by allowing citizen suits for historical violations, because a violator would receive no benefit from the notice period if a citizen could sue anyway, even if the violator cured his noncompliance within the sixty-day period. *Id.* at 59-60. Second, the Court noted that "The bar on citizen suits when government enforcement action is under way suggests that the citizen suit is meant to supplement rather than supplant governmental action." *Id.* at 60. From this observation, the Court concluded

that allowing citizen suits for historical violations would undermine the enforcement discretion that Congress intended for the EPA. *Id.* at 60-61.

Consistent with the Sixth Circuit's decision in *Musical Instruments*, this Court concludes that § 326(a) of EPCRA does not provide the right for a citizen to sue for historical violations of the Act. The "complete and submit" language of that section, along with the purpose of the notice period and Congress' intended role for the citizen-plaintiff, leads the Court to that decision.

CBE's attempt to uncover a flaw in the *Musical Instruments* court's reasoning is also unavailing. CBE argues that, since Congress amended the Clean Water Act in 1990 to allow citizen suits for historical violations of the Act, then it must have implicitly meant that statutes with notice provisions (like the Clean Water Act and EPCRA) are, indeed, compatible with citizen suits for historical violations. But as the *Musical Instruments* court noted, it is more likely that, by amending *only* the Clean Water Act in 1990 and *not* EPCRA, Congress revealed its intent with regard to citizen suits for historical violations of EPCRA. *Musical Instruments*, 61 F.3d at 477.

Thus, to the extent that CBE claims to state a cause of action for Steel Company's late filings, or "historical violations", the Court holds that CBE has not stated a cause of action.

B. Present Noncompliance With EPCRA

Having settled the question of whether CBE may seek penalties for Steel Company's past violations of the Act, the Court must now address whether CBE has stated a

cause of action against CBE for any current failure to adhere to EPCRA reporting requirements.[1]

Steel Company claims that CBE has not stated a cause of action because the Complaint fails to allege any present noncompliance with the Act. An examination of the pertinent allegations of the Complaint bears this position out. CBE alleges that "Defendant failed to submit chemical inventory forms to the SERC, the LEPC and appropriate fire department, on or before March 1, 1988, and annually thereafter through March 1, 1995." (Complaint, ¶ 22.) Similarly, CBE alleges in Count II that "Defendant failed to timely submit chemical release forms to the EPA and designated state agency on or before July 1, 1988, and annually thereafter on July 1, 1994." (Complaint, ¶ 29.) Nowhere does CBE allege that Steel Company has not "completed and submitted" EPCRA forms to the required agencies.

In addition, it is uncontested that before the Complaint was filed, Steel Company filed the proper forms with the required agencies for the relevant periods in response to CBE's notice of intent to sue.[2] If it were not the case it

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[1] CBE claims that Steel Company's failure to file timely EPCRA reports *is* a present and ongoing violation of the Act. (See Plaintiff's Reply Memorandum at 10, n. 15: "Defendant can never remedy the fact that it did not file the reports on time, and will always be in violation of EPCRA for the years which it failed to file timely reports.") This argument, however, is merely another way of alleging historical violations of the Act, and this Court will treat it as such.

[2] The Court takes notice of the forms filed with the various agencies as they are matters of public record. *United States v. Wood*, 925 F.2d 1580, 1581 (7th Cir. 1991) (on a motion to dismiss, "[t]he district court may also take judicial notice of matters of public record.").

seems likely that CBE would have included such an allegation in their complaint; no such allegation is present.[3] Because the Complaint alleges only a failure to timely file the required reports, a violation of the Act for which there is no jurisdiction for a citizen suit, the Court dismisses the Complaint.

CONCLUSION

For all of the above reasons, the Court grants Steel Company's motion to dismiss.

ENTER:

/s/ George M. Marovich
George M. Marovich
United States District Judge

DATED: December 19, 1995

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[3] In response to the motion to dismiss, CBE attempts to effectively amend its complaint through its memoranda in opposition to the motion. CBE now apparently claims that Steel Company is not in compliance with EPCRA because the reports they submitted pursuant to EPCRA are somehow incomplete or inaccurate. To support this theory, CBE submits the affidavits of employees of various agencies which indicate that while they can certify that Steel Company has submitted the proper forms, they cannot certify whether those forms are accurate. Because there is no allegation in the Complaint that these forms are inaccurate or incomplete, these affidavits, even if properly considered here, would be irrelevant.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JUDGMENT IN A CIVIL CASE

CITIZENS FOR A BETTER ENVIRONMENT

v No. 95 C 4534

THE STEEL COMPANY, a/k/a CHICAGO STEEL AND PICKLING COMPANY

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to a hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that plaintiff take nothing and the case is dismissed.

December 19, 1995
Date

H. Stuart Cunningham
Clerk

Frances D. Andrea
(By) Deputy Clerk